filed 1/12/81

NO. 80-1273

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1980

JOE H. MCILROY

& JOHN ROLLINS

VS.

THE STATE OF TEXAS

APPENDIX

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JOE H. McILROY, ET AL, Appellants

NO. 62,899 VS. - - - Appeal From POTTER County

THE STATE OF TEXAS, Appelle

OPINION

This is an appeal from a bond forfeiture proceeding. Appelland McIlroy was a co-surety on an appearance bond with Bobby Wynne for one John Winston Rollins who was charged with the felony offense of forgery. The appearance bond in question was signed on January 2, 1979. On January 30, 1979 the bond was declared forfeited by judgment nisi. Writs of scire facias were thereafter served on the sureties and upon John Rollins. The judgment was declared final on June 6, 1979.

In his first ground of error, appellant contends that the trial court erred in entering final judgment because the evidence was insufficient to show a violation of the terms and conditions of the

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bond for the reason that the principal, John Rollins, "was required to appear 'at the next term of said court,' and the 'next term' of the court in which forfeiture was rendered had not yet begun at the time of the rendition of the judgment nisi herein."

Appellant's point is not well taken. Whatever may be the effect of a condition which requires the appearance of a defendant at "the next term" of the district court, is was also a condition of his bond that appellant "make personal appearance at any time when, and place where, (appellant's) presence may be required under the code or by any court or magistrate ...." Accordingly, there is no merit to appellant's contention that the evidence supporting the forfeiture of his bond was insufficient on the ground that bond "required only that (he) appear 'at the next term of said court' and the 'next term' of the court in which forfeiture was rendered had not yet begun...." Appellant's first ground of error is without merit and is overruled.

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In his second and third grounds of error, appellants suggest that there was no evidence or that the evidence was insufficient "to show that the cases in which the bond was forfeited were the same cases for which the bond was made in that the bond signed by Joe H. McIlroy and Bobby Wynne as sureties showed on its face that it was made in a case bearing the district court docket number 11475, and naming John Winston Rollins as defendant, whereas the cases upon which the judgment nisi and final judgment for forfeiture were rendered to 'John (NMN) Rollins' as defendant, and bore the district court's docket's number 18,937C and 364-C. Further the judgment nisi did not allege that the sureties had signed a bond to guarantee the appearance of John Rollins at any time or place, but instead alleged that the sureties had made a bond to guarantee the appearance of one John Williams."

The record reflect that the bond was entered into on January 2, 1979, subsequent to the filing of a complaint against the principal defendant Rollins.

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The indictment, however, was not returned until January 25, 1979 thus the variance between a pre-indictment docket number and the number under which the cause was docketed after indictment is not significant. Appellant was required, by the terms of the bond, to insure the presence of the principal, Rollins, at "any and all subsequent proceedings." Appellant's contention that there was no evidence to support the bond forfeiture is without merit.

Appellant also suggests that the evidence was insufficient to support the bond forfeiture. Appellant makes much of the recitation in the judgment nisi that "John Williams, as principal, had entered into a bond." It is abundantly clear that this recitation was a mere clerical error, since the same judgment nisi declared the bond forfeited for the failure of "John Rollins" to appear. Moreover, the judgment nisi was properly amended according to the terms of Article 22.12, V.A.C.C.P. Furthermore, the omission of the middle name or initials of the principal, Rollins, is not a variance and is of

no significance. Appellant's third ground of error is overruled.

Similarly, in his fourth ground of error, appellant argues that the trial court erred in rendering final judgment because the judgment nisi recited that "John Williams" as principal, had entered into a bail bond whereas the judgment nisi ordered a forfeiture of the bond for the failure of John Rollins to appear. There was no material variance in the judgment nisi, and if there was it was corrected by the amended judgment nisi which appears in this record. Article 22.12, V.A.C.C.P. See Le Mier v. State 489 S.W.2d 898, 899 (Tex.Cr.App. 1973). This ground of error is overruled.

In his fifth ground of error, appellant contends that there was a fatal variance between the pleading and the proof in that "the judgment nisi alleged a bond to answer 'upon a charge by indictment', thereas (sic) the bond entered in evidence herein did not make reference to any indictment, but instead

showed the defendant to be charged by 'complaint'." As we have previously pointed out, the principal was required to appear in response to "any and all subsequent proceedings." Accordingly, the bond was properly forfeited for failure to answer "upon a charge of indictment." Appellant's fifth ground of error is overruled.

In his sixth ground of error, appellant contends that judgment nisi was entered erroneously "for the reason that the defendant could not have been legally forced to trial at said time because his court-appointed attorney had not been given the required period of ten days in which to prepare for trial." The terms of the bond required the principal's appearance at any and all proceedings. The record does not show the nature of the proceeding which the principal did not attend. Moreover, there was no showing that an attorney had been appointed for him at that time. Even had an attorney been appointed, the ten-day preparation period could have been waived. We are unwilling to indulge in speculation as to why the principal was required to

appear. We reaffirm the rule that the judgment nisi is prima facie proof that the statutory requirements concerning bond forfeiture have been met. There is nothing in the record which lends support to appellant's contentions to the contrary. This ground is overruled.

In his seventh ground of error, appellant suggests that the trial court erred in rendering judgment nisi because the principal could not have been legally forced to trial on the date upon which the judgment nisi was entered for the reason that he had not been given 10 days in which to file defensive pleadings. For the reasons outlined in our treatment of his previous ground of error, we overrule this contention.

Finally, appellant contends that the trial court erred in rendering judgment of forfeiture against the sureties in the sum of $19,000 "in that said judgment was excessive in amount under the circumstances and conditions shown by the evidence." Appellant concedes that the power of remittitur is discretionary

in the trial court. Article 22.16, V.A.C.C.P. It was shown that the co-surety Wynne had made efforts to locate the principal and had incurred expenses in this effort. The remittitur of $1,000 was sufficient to compensate him for these efforts. No abuse of discretion is shown. See Fernandez v. State, 516 S.W. 2d 677, 679 (Tex.Cr. App. 1974). This ground of error is overruled.

In a supplemental brief, appellant again contends that there was a failure of proof to support the bond forfeiture because "the State's own evidence showed affirmatively that the cases were different." Appellant also renews his contention that the discrepancy in names in the judgment nisi constituted a fatal variance. We have examined the cases cited to us by appellant in support of these contentions and we remain convinced that our original disposition of the grounds of error for which he has cited them is correct.

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The judgment is affirmed.

PER CURIAM

DELIVERED: July 16, 1980

BY: Panel 2, 1st Quarter, 1980

COMPOSED OF: Leon Douglas, Judge
Truman Roberts, Judge
Sam Houston Clinton, Judge

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POTTER COUNTY TEXAS
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DEPUTY
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ATTACHMENT A-1

APPENDIX -9

COURT OF CRIMIANL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas, September 17- 1980

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave To File" the appellant's Motion for Rehearing in Cause No. 62,899 , John Rollins

vs.

THE STATE OF TEXAS Appellee.

Sincerely yours, Thomas Lowe

Clerk

ATTACHMENT "B"

APPENDIX -10

CIVIL NO. 364C
CRIM. NO. 18937C

THE STATE OF TEXAS § IN THE 251st DISTRICT COURT

VS. § IN AND FOR

JOHN ROLLINS § POTTER COUNTY, TEXAS

FINAL JUDGMENT DECLARING FORFEITURE

On the 4th day of June, 197 9, the above entitled and numbered cause, wherein the State of Texas is plaintiff and John Rollins as principal, and Bobby Wynne and Joe H. McIlroy as (sxxxxx (sureties) on the bail bond of John Rollins are defendants, came on to be heard, and whereupon came the State of Texas by her Assistant District Attorney, and came the defendant (xxxxxx) (Sureties) by XXXX (their) attorney of record, Thomas Kendrick and it appearing to the Court after consideration of the pleadings and the evidence herein that no sufficient reason is shown why the defendant, John Rollins, did not appear in this court on the 30th day of January, 197 79, to answer the State of Texas on a charge by indictment herein filed

ATTACHMENT "C"

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and then and there pending accusing him of the offense of a felony, and that the Judgment Nisi heretofore rendered herein against the said defendants, should be made final.

It further appearing to the Court that the surety had incurred considerable expense in attempts to locate and return John Rollins to this Court, and that Bobby Wynne and Joe H. McIlroy (xxxxx (sureties) should be allowed credit on these expenditures in the amount of One-Thousand (1000.00).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the State of Texas do have and recover of the said John Rollins, as principal, the sum of Twenty-Thousand ($20,000.00) and costs of suit and in like manner do have and recover from the said Bobby Wynne and Joe H. McIlroy as xxxxx (sureties), the sum of Nineteen-Thousand ($19,000.00) and costs of suit, for all of which let execution issue.

ENTERED this the 6 day of June, A.D. 197 9.

/s/ Naomi Harney
Judge Presiding

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ATTACHMENT "C"

APPENDIX -12

In the Name and by the Authority of the State of Texas

THE GRAND JURORS for the County of Potter, State aforesaid, duly organized, impaneled and sworn as such at the JANUARY Term, A.D., 19 79, of the District Court of the 181ST Judicial District, in and for said County, upon their oaths in said Court present that JOHN ROLLINS hereinafter called defendant on or about the 11th day of May, A.D., 19 78, and anterior to the presentment of this Indictment, in the County of Potter and State of Texas, did then and there knowingly and intentionally, with intent to defraud and harm, forge, by making a writing, known to the defendant to be forged, as follows:

ATTACHMENT "D"

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NB NORTH STATE BANK

PLEASANT VALLEY SERVICES 1277
1404 E. ST. FRANCIS 383-6831 or 383-4205
AMARILLO, TEXAS 79108 88-2334
1113

May 12, 19 78

PAY
TO THE
ORDER OF ROLLINS, John $ 173.80

ONE HUNDRED & SEVENTYTHREE DOLLORS & EIGHTY CENTS-DOLLARS
BY ENDORSEMENT THIS CHECK WHEN PAID IN
FULL PAYMENT OF THE FOLLOWING ACCOUNT

/s/ Jesse Morrow Jr

':1113::: 2334: '07 891 3 01 00000 17380

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POTTER COUNTY TEXAS
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BILLIE NANCE HILL

against the peace and dignity of the state.

/s/ Don Lamb
Foreman of the Grand Jury.

ATTACHMENT "D"

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THE STATE OF TEXAS §
COUNTY OF POTTER §

I, _____ Clerk of the District Court of _____ County, Texas, do hereby certify that the within and foregoing is a true and correct copy of the Original Bill of Indictment, filed in said court on the _____ day of _____A.D., 19 ___, in Cause No. _____ styled The State of Texas, vs. _____ _____.

Given under my hand and seal of said Court, at office in _____ this _____ day Of _____ A.D., 19 _____.

By:_____Clerk

_____Deputy

ATTACHMENT "D"

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NO. 18937C

THE STATE OF TEXAS

vs.

JOHN ROLLINS

I N D I C T M E N T

Offense:
Forgery

_____, Attorney

A TRUE BILL

/s/ Don Lamb
Foreman of the Grand Jury

Filed on the 25th day of January, 19 79

/s/ Billie Nance Hill
Clerk of District Court.

/s/ Linda Haley Deputy

Amount of Bail, $_____

ATTACHMENT "D"

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